DOCUMENT RESUME

ED 381 890 EA 026 682

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TITLE A Preventive Law Approach to the Family and Medical Leave Act of 1993.
PUB DATE Nov 94
NOTE 28p.
PUB TYPE Legal/Legislative/Regulatory Materials (090) -- Guides - Non-Classroom Use (055)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Compliance (Legal); Elementary Secondary Education; Employee Assistance Programs; Family Work Relationship; *Federal Legislation; Federal Regulation; Higher Education; *Leaves of Absence; *Personnel Policy; Policy Formation; *Released Time; School Responsibility
IDENTIFIERS *Family and Medical Leave Act 1993

ABSTRACT

The Family and Medical Leave Act (FMLA) of 1993 was passed to promote a healthier balance between work and family responsibilities. It allows covered employers to grant up to 12 weeks of unpaid leave to eligible workers for: (1) the birth, adoption, or foster-care assumption of a child; (2) the "serious health condition" of a spouse, son, daughter, or parent; and (3) a "serious health condition" that renders the employee incapable of performing his/her essential job functions. This paper outlines definitions that employers need to know and provides guidelines for establishing policies in preparation for FMLA requests, communicating those policies to employees, and maintaining documentation. (LMI)

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A Preventive Law Approach to The Family and Medical Leave Act of 1993

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EA 026 682

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The Family and Medical Leave Act of 1993 became effective on August 5, 1993. It is the newest "minimum labor standard," such as child labor laws, Social Security, OSHA and Minimum Wage (Fair Labor Standards Act).

The FMLA is based on the recognition of the great increase in single parent households and homes where both parents are working. The Act states that the FMLA "is intended to promote a healthier balance between work and family responsibilities...." The U.S. Department of Labor administers the FMLA.

1. The purpose of the FMLA is:

   For covered employers to grant up to 12 weeks of unpaid leave to eligible workers for:

   1. The birth, adoption, or foster care assumption of a child (this leave must be taken within 12 months of the event); Spouses employed by the same employer can only take an aggregate of 12 weeks for the birth of a child. For a sick child, each can take 12 weeks unpaid leave. (See McWright v. Lamar Alexander, 982 F.2d 222, 1992.)
   2. A "serious health condition" of spouse, son, daughter or parent.

3. A "serious health condition" that makes the employee unable to perform his or her essential job functions. NOTE: A "serious health condition" under the FMLA is one which requires either in-patient care or "continuing treatment by a health care provider." Among other serious health conditions, cancer, heart attacks, treatments for allergies , stress or substance abuse are covered by the FMLA.

Minor conditions and minor illnesses are not serious health conditions for FMLA purposes. Certification of an employee's serious health condition from the health care provider based on the essential functions of the job, may be requested by the employer. Employers should designate the essential functions in a job description provided to the health care provider. The certification issued in response should be within 15 days.

How does the FMLA relate to other laws? The FMLA does not change or supersede other equal or stronger federal, state or local laws. Thus, for instance, the Americans with Disabilities Act of 1990 must be strictly complied with while following the FMLA. In implementing the FMLA, an employer must not discriminate against an employee who associates with a

disabled person (as in ADA), and if the employer has drawn up essential job functions in order to comply with the ADA, those same essential functions should be used in certifying a "serious health condition" under the FMLA (unless the employee is totally incapacitated). Also, there should be policy and procedure in place to keep all medical records confidential. As in the ADA, good faith is important in following the FMLA. The ADA definitions for disability are used in the FMLA. Reasonable accommodations to the ADA may include giving some additional unpaid leave to an employee after the FMLA leave expires. Documentation is important in the FMLA, as in the ADA. For example, it is good to document all the costs involved in granting an FMLA leave, in case the "undue burden" of continuing it is raised.

Definitions

1. "Covered" - Your business or institution is covered by FMLA if it is a public agency, or a private employer of 50 or more employees (at least 50 when leave is requested), who are employed for each working day during each of 20 or more calendar work weeks in the current or preceding calendar year, any "successor in interest" to such employer (continuity of work force, same plant,

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similar jobs, supervisors products and services), any "integrated employer" (2 businesses have common ownership, centralized control of labor.)

High Schools and elementary schools (but not colleges and universities) have special rules for leave, to allow a term to finish, etc.

2. "Eligible" - Which employees are eligible to take FMLA leave? In order to be eligible, an employee must have worked for the employer for at least 12 months, and for at least 1,250 hours during the year immediately preceding the start of the leave, and be employed at a worksite (the worksite for salesmen and construction workers is the home base from which work is assigned, or where they report) where the employer employs at least 50 employees within a 75 surface road mile radius. An eligible employee is entitled to take up to 12 weeks of FMLA in any 12 month period designated by the employer out of four choices. Part-time workers are covered by the FMLA. (See Cohen v. S.U.P.A. Inc., 814 F. Supp. 251, 1993.)

3. "The 12 Month FMLA Period" - The employer should select and give wide notice on which of the following choices will be policy.

   a. The 12 month calendar year.

   b. Any 12 month "leave year" i.e. fiscal year.

   c. The 12 month period measured forward from the first FMLA leave date.

   d. A rolling 12 month period backward (but not before August 5, 1993) from the time any FMLA leave is used.

The use of flexible 12 month periods is the only way to make sure an employee will not put together 24 weeks of leave by taking 12 weeks at the end of one year and 12 weeks at the start of the next year (called "leave stacking"), although fixed years may be easier to administer. A change can be made in the 12 month period with 60 days notice by the employer.

4. "Spouse" - The regulations define "spouse" in accordance with state law, including common law marriages recognized by the state. In the definition of spouse, unmarried domestic partners are not intended to be covered under FMLA.

5. "Son or Daughter" - For FMLA purposes, the term "son or daughter" is defined as a

"biological, adopted or foster child, a step-child, a legal ward, or a child of a person standing in loco parentis, who is (a) under 18 years of age; or (b) 18 years of age or older and incapable of self-care because of a mental or physical disability.

6. "Parent" - The FMLA defines "parent" as the employee's biological parent or a person who stood in loco parentis to an employee while he/she was a son or daughter.

7. "Health Care Provider" - The regulations define a health care provider to include:

   a) Doctors of medicine or osteopathy who are state licensed,

   b) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors who are state authorized.

   c) Nurse practitioners and midwives authorized under the state law and

   d) Christian Science practitioners listed with the First Church of Christ in Boston, Mass.

In this case, an employer can require a second and a third medical certification from a health care provider other than a Christian Science practitioner.

8. "Key Employee" - A "key" employee is among salaried persons with highest paid 10 percent of employees employed with 75 miles of his or her worksite. An employer does not have to restore a job to a "key" employee who takes FMLA leave, if necessary to prevent substantial and grievous economic injury to the employer, but notice must be given.

9. "Certification" - Decide which certification by health care provider (such as the model D.O.L. Certification attached) of "serious health condition" of the employee, based on prior understood essential functions, is required for a medical leave, and what regular certification and statement of intent to return by the employee on leave (if any) is required, as well as whether a certification at the end of leave is required. Certification for an employee's own serious health condition should be based on the essential job functions which the employer gives to the health care provider when the employee applies for FMLA leave. For an employee to take leave to care for a family member, a health care provider must give to the employer a certification that the

employee is "needed to care" for a family member. Both physical and psychological care are covered under FMLA.

10. "Second and Third Opinions" - A second medical opinion at the employer's expense may be requested by the employer, if he/she questions the certification of the employee's health care provider.

    A third, binding, medical opinion, agreeable to both sides and paid for by the employer, may be done if there is a conflict between prior opinions.

11. "Intermittent Leave" - The employee who requests intermittent leave, or a reduced leave schedule for a "medical necessity" must submit verification (based on the essential functions of the job) from a health care provider. Intermittent leave may, at employer's choice, be granted for birth and adoption, but must be granted for the employee's serious health condition, when certified and when "needed to care" for a family member. Generally, intermittent leave except when medically necessary is only at the employer's approval and an employer can ask the employee to transfer to an open

position temporarily with the same pay and benefits, but not the same duties. Intermittent leave to care for a child within 12 months of birth or adoption is allowed only with the employer's agreement. An employee's 30 day notice should include medical certification.

12. "The Employer's Payments during FMLA Leave" - During the employee's FMLA leave the employer must pay only the payments on the employee's existing group health plan. An employer may recover these premiums if the employee does not return to work. An employer is not required to provide health benefits unless the employer already does so. An employer should list any planned payments to be made, on the employee's medical insurance, and plan to determine how much the employer and employee must pay each month and how the employees share is collected during FMLA leave. If the employee does not pay his/her share during FMLA leave, the employer may pay it, in order to keep the insurance policy active, and collect from the employee after the FMLA leave.

If the employee fails to return from leave, the employer may recover the health care contributions it paid during the employee's leave. But this is not permitted when an employee fails to return to work because of the onset, continuation or recurrence of a serious health condition of the employee or family member or because of "other circumstances beyond the control of the employee."

13. "Substituting Accrued Paid Leave for FMLA Unpaid Leave" - Accrued paid leave that may be substituted for unpaid leave includes vacation, personal, family and sick leave. But sick leave may only be substituted for leave taken for the employee's own or the employee's family's serious health condition. An employee has a right to substitute paid medical or sick leave for FMLA leave to care for a seriously ill family member only if the employer's health plan allows paid leave to be used for that purpose.

This must be discussed by employee and employer before the leave is begun and employer may require employee to use accrued paid leave as part of the 12 week FMLA leave. While employee is on leave, no vacation, seniority, or sick leave accrue unless the employer allows it. An employee on FMLA leave may be required to report on his/her status and intent to return to work periodically.

14. "Reinstatement to The Same or An Equivalent Position" - Upon returning from FMLA leave, an employee must be reinstated to the same position held before leave or to an "equivalent" position with "equivalent" pay, benefits and other terms and conditions of employment. "Equivalent" is a more stringent standard than "comparable" or "similar." Although an employee's reinstatement rights are protected, the employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. There is no leeway in time allowed for reinstatement after an employee's FMLA leave is over. Reinstatement must be immediate, then. A policy should be written regarding

this, including restoration to equivalent employment and deciding in advance of any FMLA leave request what jobs are "equivalent."

What to Do

To Prepare for FMLA Requests - Set policies. State which area will administer the FMLA policies on notice, certification, accumulated paid leave, intermittent leave, reinstatement, COBRA, exempt employees. Your FMLA policy should be written with the above definitions and the following points in mind.

I. Meet with supervisors, or Department Heads, and:

1. Determine with supervisors who and how many of your employees are eligible for FMLA leave.
2. Work with eligible employees and supervisors to plan for how each job would be covered if the current worker took 12 weeks FMLA leave. Would temporary workers, or cross-training of existing workers be best? Put the plan in writing.
3. List the supervisor's duties in planning for FMLA leave and in monitoring it, and in the employee's reinstatement at the end of FMLA leave. Determine who should ask the medical questions of the employee and keep this

medical information confidential from the supervisors and the department heads. Be sure all those who talk with employees about FMLA leave are trained in ADA interview techniques, and use these when talking with employees about the FMLA. Write a policy on supervisors' FMLA duties, and their documentation duties. Share all FMLA policies, including requesting leave, verifying information prior to leave, monitoring the status of a leave, reinstatement, and ways to cover the work of employees who take FMLA leave with supervisors.

4. Look at the "key" employees and project whether you would refuse to restore their jobs if they took FMLA leave. Write your policy on key employees.

5. Study the group health insurance plan, and determine what the employer's payment would be during an employee's FMLA leave. Also, decide how and by whom to get the employee's part of the payment during the leave period, if payment can be in one lump sum by employee, or checks sent in at regular intervals. Review the requirements of your

group insurance plan. The FMLA mandates that the employer pay only for health-care benefits coverage during the employee's leave, but that all fringe benefits be reinstated on the employee's return. Pension and retirement plans must treat leave as continued service for purposes of vesting and qualification, but not for accrual of benefits. While no seniority or other employment benefits accrue during the leave, any increases in pay or changes in benefits occurring during the leave which are not based on seniority are effective upon the employee's return to work. If the employee allows his/her share of the insurance premiums to lapse during the FMLA 12 week leave, the employer may pay the employee's share, and then require the employee to reimburse those payments after he/she returns to work.

If the employee does not return to work after the FMLA leave, the employer may recover all employer group health insurance payments made during the employee's leave, unless the employee cannot return to work due to serious health reasons or other circumstances beyond

the employee's control (i.e. An employee's spouse is unexpectedly transferred to a job location more than 75 miles from employee's worksite). Determine what benefits are now offered to the employee and which ones will be reinstated after the FMLA leave. Write this in the policy.

6. Write a policy on certification, to include your certification forms, or letters, from health care providers. You may wish to use the D.O.L. model forms (attached). Have certification for a) an employee's serious health condition. (Give health care provider the essential job functions). The employer must allow the employee at least 15 calendar days to produce the certification. b) The care of an employee's spouse, parent or child, c) optional certification of progress during leave and intent to return d) optional certification of employee's ability to return to job, or certification of employees inability to return to job, at the end of the leave. The employer may designate paid leave as FMLA leave only on the basis of information provided to the employer by the employee. The employer may then require that

paid leave be incorporated into the 12 week FMLA leave, and tell employee before the leave.

7. A policy to state where, how and by whom confidential records of FMLA requests and actions will be kept.

8. List when paid vacation and other leave can be applied to the unpaid FMLA leave, and when employer will require it. This may be kept on an individual basis.

9. Review and rewrite your current medical leave and absentee policies, to conform with the FMLA. Treat an absence under FMLA the same way you would treat an absence for military duty, that is for absentee policy purposes, act as if the FMLA leave did not exist.

10. Give notice by employer of what FMLA leave can be granted for, including birth or adoption of a child, serious illness of family member or employee's own illness, to include treatments for allergies, stress or substance abuse <u>should be clearly posted.</u> Printed FMLA policies should be distributed to all employees.

11. Up-date all job descriptions for purposes for both FMLa and ADA. Be sure all essential job functions are in each job description.

12. A policy on intermittent leave, should be written. Will you grant it for births and adoptions? When certifying for intermittent or reduced leave the employee must indicate the dates on which treatment is expected. A pregnant employee is entitled to FMLA leave for severe morning sickness, for other complications for inpatient care after childbirth, and a period of recovery after childbirth. (So an employer may want to consider intermittent leave during an employee's pregnancy).

How to determine the schedules of intermittent or reduced leave may be the most anguishing problem under the FMLA. While the FMLA allows the employer to require the employee to produce certification for the need for intermittent leave, the FMLA appears to grant the employer no control over determining the schedules of the leave.

On intermittent leave, for any condition other than inpatient care, the employee or family member must be receiving continuing

treatment. Note that the employee has a duty to schedule the treatment (of employee, or employee's spouse, child or parent), subject to the approval of health care provider, to make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations. Sec 102 (e) (21 (A). When certifying for intermittent or reduced leave the employee must indicate the dates on which treatment is expected. On intermittent leave, for any condition other than inpatient care, the employee or family member must be receiving continuing treatment.

13. A reinstatement policy should include a provision for eligible employees to return to work at the same position held before the FMLA leave, or an equivalent position (same pay, benefits, working conditions, same or equivalent duties and responsibilities.) The Senate Report defines "equivalence" as a "stringent standard" that "requires correspondence to the duties and the terms, conditions and privileges of an employee's previous position."

14. Write the statement for employees to sign before going on FMLA. It should include:

a) Request for leave, and certification approval.

b) The certifications required from employee while on leave, and when leave is completed.

c) The insurance payments employee must make while on leave, and when and how employee should pay this to employer.

d) Acknowledgement that no new seniority or vacation or other benefits accrue while on leave, but all existing benefits are restored after leave unless employer allows this.

e) Whether accrued paid leave will be included in the FMLA leave.

15. Note that the employee has a duty to schedule the treatment (of employee, or employee's spouse, child or parent), subject to approval of health care provider, to make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations. Sec. 102 (e) (21) (A).

16. Notice to Employer

There are no penalties to an employee for failing to provide notice. Sec. 102 (e) (21) (B).

17. Write a policy to state that an employees's exempt status as a professional, administrator or executive employee will not be jeopardized by the use of unpaid, intermittent leave. With the FMLA, an exempt employee will be docked for taking intermittent leave on a reduced work-day basis for family or medical leave purposes. Sec. 102 (c).

18. Leave taken under FMLA is not a qualifying event to trigger COBRA, but the employee not returning to work after the leave <u>is</u> a qualifying event.

19. The FMLA states that the employer may recover insurance payment costs paid on FMLA leave if the employee does not return, but provides no practical mechanism to do so.

20. If, an employee's position would have been eliminated while the employee is on leave, it still can be, if that elimination is for normal business reasons and has no relation to the employee taking FMLA leave. The employer has the burden of proof on job eliminations by layoff.

21. A family member of an employee must be certified to be "incapable of self-care," for the employee to get FMLA leave.

The employer may designate paid leave as FMLA leave only on the basis of information provided to the employer by the employee.

22. A policy on accrued paid leave should include that the employer may require that paid leave be incorporated into the 12 week FMLA leave, and tell employee before the leave. The employer must talk with employee about accrued paid leave before the decision to include paid leave is made, and the employer and employee should sign off on it.

23. The special rules for schools only apply to "local educational agencies" such as secondary schools and elementary schools, and <u>not</u> to colleges and universities and trade schools.

If an instructional employee seeks to take intermittent or reduced-schedule leave because of planned medical treatment for the employee or a family member and that leave would constitute more than 20 percent of the total number of workdays over the period of the leave,the school may require the employee to either (1) take the leave on a continuous basis or (2)

transfer to an available position with equivalent pay and benefits for which the employee is qualified and which better accommodates recurring periods of leave.

Under certain circumstances, a school may require an instructional employee whose leave would otherwise expire near the end of an academic term to continue to take leave until the end of the term. Collective bargaining agreements and school board or private school policies and practices are to be used to determine whether the position to which the employee will be returned is an equivalent position with equivalent pay and benefits.

24. Provide a written application form for FMLA leave and an agreement the employee must sign before taking leave.

25. Define how leave is monitored to assure employee uses no more than the maximum leave in a 12 month period. Name who will monitor each leave, and how confidential records will be kept.

26. To avoid problems with the American With Disabilities Act of 1990, provide for:

    a) Confidentiality of medical records;
    b) Narrow "job-related" health inquiries; and
    c) Do not discriminate against an employee with a disabled family member.

27. Provide posting, notice and training in the FMLA for all staff, supervisors and employees.

This law does not preempt other Federal, State, and local laws (ADA, Title VII, 1991 Civil Rights Act).

28. Compile a list of physicians who are regularly used by insurance carriers to conduct independent medical examinations to be used for your (employer's) second and third medical opinions. These doctors should be experienced in matching medical abilities with a job's essential functions. This list should include specialists in orthopedics, neurology and cardiology, because these areas form most of the controversial disability questions.

29. Make certain that parental leave is not a factor in promotions or other job decisions. The policy should state No Retaliation or Coercion, for an employee using the FMLA.

30. Review hiring procedures, training programs and plan for supervision of any substitute employees that are hired to replace regular employees who are on FMLA 12-week leave.

Communication

Once the employer's FMLA policies are in place, it is important to communicate them to all employees. Ways to do this may include:

1. Notices of FMLA posted clearly in work areas.
2. Notice of no retaliation or coercion by employer regarding an employee's use of the FMLA.
3. Supervisor, staff and employee orientation sessions which include FMLA information.

Documentation

Although no reporting is required by FMLA, documentation and record keeping by the employer is necessary. It is a good idea to open a FMLA compliance file which should include:

1. A complete set of the employer's FMLA policies, notices, and documentation of training sessions.
2. The forms for 30-day notice for foreseeable leave.
3. Three medical certification forms (for leave, for while on leave, and to return from leave).
4. A list of doctors, who perform independent medical evaluations for insurance carriers.

5. Copies of records for all FMLA leaves and leave requests.

6. A sample letter requesting a second medical opinion where employer has reason to doubt the validity of the employee's FMLA leave certification by the treating medical care provides.

7. A form to be signed by the employee authorizing the release of medical information to employer.

8. Employee time records to establish current figures for hours worked over the previous 12 months.

9. A list of the essential job functions as listed in ADA oriented job descriptions for the job of each employer in the FMLA file.

10. The Statue of Limitations on the FMLA is two years, unless an employers "willful or intentional" noncompliance with FMLA can be shown. Then the Statue of Limitations is three years.

11. In a law suit, the winning employee may be awarded all costs, attorney fees, expert witness fees, and other damages. (See Kelley Co. Inc. v. Marquardt, 493 N.W. 2d 68, 1992.)

In court the burden of proof is on the employer to show compliance with the FMLA. Employees who think they are entitled to a leave may sue you in federal or state court. If the court determines the employees' rights have been violated, it may award damages up to 12 weeks of wages for the amount of wages, salary and benefits that the employee lost or any actual monetary losses sustained as a direct result of your violation. The sum will be doubled unless the employer persuades the court that his/her violation was "in good faith" and he/she had "reasonable grounds" for believing that his/her actions were not a violation. The court may also order re-employment, reinstatement or promotion. Also, a suit may be brought by the Secretary of Labor. An employer's show of "good faith" may keep the award from doubling. Good faith can be shown, and documented, by giving notice and distributing the FMLA policy, and by giving an FMLA Training Session to all spervisors and staff, and naming who will administer FMLA.